



**FEDERAL ELECTION COMMISSION**  
**Washington, DC 20463**

*June 27, 1997*

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Craig M. Engle, General Counsel  
National Republican Senatorial Committee  
425 Second Street, NE  
Washington, DC 20002

RE: MUR 4378

Dear Mr. Engle:

On June 5, 1996, the Federal Election Commission notified the National Republican Senatorial Committee and Stan Huckaby, as treasurer, ("the NRSC") of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to the Committee at that time.

Upon further review of the allegations contained in the complaint, and information provided by you, the Commission, on June 17, 1997, found that there is reason to believe the NRSC violated 2 U.S.C. §§ 441a(f), 434(b) and 441b, provisions of the Act and 11 C.F.R. § 102.5(a) of the Commission's Regulations. The Factual and Legal Analysis, which formed a basis for the Commission's findings, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Statements should be submitted under oath. All responses to the enclosed Order to Answer Questions and Subpoena to Produce Documents must be submitted to the General Counsel's Office within 30 days of your receipt of this letter. Any additional materials or statements you wish to submit should accompany the response to the order and subpoena. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

Pursuant to its investigation of this matter, the Commission has issued the attached subpoena requiring the NRSC to designate person(s) who are knowledgeable with

regard to contacts between the NRSC and Dennis R. Rehberg, and between the NRSC and Montanans for Rehberg, in 1995 and 1996, to appear to give sworn testimony beginning August 18, 1997. Please notify this Office of the identity of the individuals who will be appearing in that capacity by July 15, 1997.

Pursuant to 11 C.F.R. § 111.14, a witness summoned by the Commission shall be paid \$40, plus mileage. Subsequent to the deposition, your client(s) will be sent a check for the witness fee and mileage.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Anne Weissenborn, the attorney assigned to this matter, at (202) 219-3690.

Sincerely,



John Warren McGarry  
Chairman

Enclosures  
Order and Subpoena  
Factual and Legal Analysis

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of

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)  
)

MUR 4378

**SUBPOENA FOR DEPOSITION**  
**SUBPOENA TO PRODUCE DOCUMENTS**  
**ORDER TO SUBMIT WRITTEN ANSWERS**

TO: National Republican Senatorial Committee  
425 Second Street, NE  
Washington, DC 20002

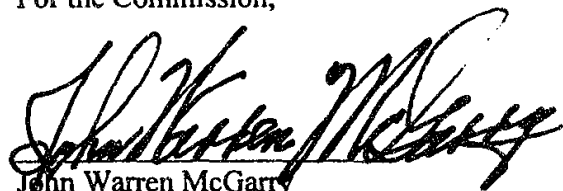
Pursuant to 2 U.S.C. § 437d(a)(3), and in furtherance of its investigation in the above-captioned matter, the Federal Election Commission hereby subpoenas the National Republican Senatorial Committee ("NRSC") to designate the person(s) who are knowledgeable to appear for a deposition with regard to contacts between the NRSC and Dennis R. Rehberg, and between the NRSC and Montanans for Rehberg, in 1995 and 1996. Notice is hereby given that the deposition is to be taken on August 18, 1997, at 999 E Street, NW, Washington, DC, beginning at 9:30 a.m. and continuing each day thereafter as necessary.

Further, pursuant to 2 U.S.C. § 437d(a)(1) and (3), the NRSC is hereby subpoenaed to produce the documents requested on the attachment to this Subpoena and ordered to submit written answers to the questions attached to this Order. Legible copies which, where applicable, show both sides of the documents may be substituted for originals. All written answers must be submitted under oath and must be forwarded to the Office of the General Counsel, Federal


Election Commission, 999 E Street, NW, Washington, DC 20463, along with the requested documents within 30 days of receipt of this Order and Subpoena.

WHEREFORE, the Chairman of the Federal Election Commission has hereunto set his hand in Washington, D.C. on this *27th* day of *June*, 1997.

For the Commission,

  
John Warren McGarry  
Chairman

ATTEST:

  
Marjorie W. Emmons  
Secretary to the Commission

Attachment

Questions and Request for Production of Documents with  
Instructions and Definitions

### **INSTRUCTIONS**

In answering these requests for production of documents, furnish all documents and other information, however obtained, including hearsay, that is in possession of, known by or otherwise available to you, including documents and information appearing in your records.

Should you claim a privilege with respect to any documents, describe such items in sufficient detail to provide justification for the claim. Each claim of privilege must specify in detail all the grounds on which it rests.

Unless otherwise indicated, the discovery request shall refer to the time period from January 1, 1995 to July 1, 1996.

The following requests for production of documents are continuing in nature so as to require you to file supplementary responses or amendments during the course of this investigation, if you obtain further or different information prior to or during the pendency of this matter

### **DEFINITIONS**

For the purpose of these discovery requests, including the instructions thereto, the terms listed below are defined as follows:

"You" shall mean the named respondent in this action to whom these discovery requests are addressed, including all officers, employees, agents or attorneys thereof.

"Persons" shall be deemed to include both singular and plural, and shall mean any natural person, partnership, committee, association, corporation, or any other type of organization or entity.

"Document" shall mean the original and all non-identical copies, including drafts, of all papers and records of every type in your possession, custody, or control, or known by you to exist. The term document includes, but is not limited to books, letters, contracts, notes, diaries, log sheets, records of telephone communications, transcripts, vouchers, accounting statements, ledgers, checks, money orders or other commercial paper, records of wire transfers, telegrams, telexes, pamphlets, circulars, leaflets, reports, memoranda, correspondence, surveys, tabulations, audio and video recordings, drawings, photographs, graphs, charts, diagrams, lists, computer print-outs, and all other writings and other data compilations from which information can be obtained. For all types of documentary records requested, if any of these records are maintained on any storage format for computerized information (e.g., hard drive, floppy disk,

CD-ROM), provide copies of the records as maintained on that storage format in addition to hard (i.e., paper) copies.

"Identify" with respect to a document shall mean state the nature or type of document (e.g., letter, memorandum), the date, if any, appearing thereon, the date on which the document was prepared, the title of the document, the general subject matter of the document, the location of the document, and the number of pages comprising the document.

"Identify" with respect to a person shall mean state the full name, the most recent business and residence addresses, the telephone numbers, the present occupation or position of such person, and the nature of the connection or association that person has to any party in this proceeding. If the person to be identified is not a natural person, provide the legal and trade names, the address and telephone number, and the full names of both the chief executive officer and the agent designated to receive service of process for such person.

"And" as well as "or" shall be construed disjunctively or conjunctively as necessary to bring within the request for the production of documents any documents and materials which may otherwise be construed to be out of their scope.

### **INTERROGATORIES**

1. Identify by meeting all persons employed by, or serving as officers and/or volunteers with, the NRSC who attended meetings with Dennis R. Rehberg and/or representatives of Montanans for Rehberg in Washington, DC or elsewhere in 1995 and 1996, prior to Mr. Rehberg's nomination to the office of U.S. Senator from the State of Montana in June, 1996, including, but not limited to, meetings in July, 1995 and on May 1, 1996.
2. Identify by meeting all persons employed by, or serving as officers and/or volunteers with, Montanans for Rehberg who took part in meetings with representatives of the NRSC in Washington, DC or elsewhere in 1995 and 1996, prior to the nomination of Dennis R. Rehberg to the office of U.S. Senator from the State of Montana in June, 1996.
3. Identify all persons employed by, or serving as officers and/or volunteers with, the NRSC who engaged in telephone and/or written contacts with Dennis R. Rehberg and/or representatives of Montanans for Rehberg in 1995 and 1996, prior to Mr. Rehberg's nomination to the office of U.S. Senator from the State of Montana in June, 1996.
4. Identify the production company which produced, in April and/or May, 1996, a radio advertisement supporting the candidacy of Dennis R. Rehberg, one script for which included a disclaimer stating that the advertisement was being paid for by the NRSC.

5. Identify all persons employed by, or serving as officers and/or volunteers with, the NRSC who were involved in arrangements for a fundraising event held by or for Montanans for Rehberg at the Ronald Reagan Republican Center in Washington, DC on May 1, 1996.

### **REQUEST FOR DOCUMENTS**

1. Produce all documents that in any way relate or refer to the production and placement of all advertisements run by the NRSC on radio and television stations in the State of Montana during the months of April, May and June, 1996, including, but not limited to, advertisements with scripts designated "Pay, Taxes" (Baucus) and "1974-Baucus." Documents produced should include, but not be limited to, electronic transfers, bank checks, radio and television order forms, purchase orders, invoices, contracts, telecommunication transmittal sheets, memos, telephone messages, telephone logs, electronic mail messages, notes, correspondence and memoranda.
2. Produce all documents that in any way contain, or refer or relate to, any and all communications and meetings in 1995 and 1996 between any officer, employee or consultant of the NRSC and Dennis R. Rehberg, and/or between any officer employee or consultant of the NRSC and any officer, employee, consultant, or volunteer of the Montanans for Rehberg Committee, including meetings between Mr. Rehberg and NRSC representatives in Washington, DC in July, 1995, and on May 1, 1996.
3. Produce all documents that in any way contain, or refer or relate to, fundraising events held by Montanans for Rehberg in Washington, DC on October 14, 1995 and March 21, 1996, the latter at the Ronald Reagan Republican Center, 425 Second Street, NE.
4. Produce all calendars, appointment books and daily logs kept by or for all persons identified in answer to Interrogatories 1 and 3 in 1995 and 1996.

## **FACTUAL AND LEGAL ANALYSIS**

**RESPONDENTS: National Republican Senatorial Committee  
Stan Huckaby, as treasurer**

**MUR 4378**

### **I. GENERATION OF MATTER**

This matter was initiated by a complaint filed on May 31, 1996, on behalf of U.S. Senator Max Baucus and Friends of Max Baucus '96'. The complaint alleges (1) that the National Republican Senatorial Committee ("the NRSC") and Stan Huckaby, as treasurer, exceeded the limitations on general election-related coordinated party expenditures at 2 U.S.C. § 441a(d) when it made expenditures for television and radio advertisements broadcast in Montana in 1996 which assertedly involved "a clearly identified candidate" and an "electioneering message"; (2) that the monies used by the NRSC for these media purchases were in part prohibited or excessive, placing them in violation of 2 U.S.C. § 441b and 2 U.S.C. § 441a; and (3) that the NRSC failed to report these expenditures properly, in violation of 2 U.S.C. § 434(b).

The subject NRSC expenditures were made in April and May, 1996, and thus prior to Montana's June 6 primary elections. The complaint alleges that the expenditures, which purchased advertisements critical of U.S. Senator Max Baucus, were intended to benefit the candidacy of Lt. Governor Dennis R. Rehberg for the U.S. Senate.



## II. FACTUAL AND LEGAL ANALYSIS

### A. The Complaint

#### 1. Coordination with Candidate

The complaint alleges that the NRSC made expenditures for radio and television advertising in Montana in 1996 which constituted party expenditures coordinated with the campaign of Lt. Gov. Rehberg and, therefore, were subject to the limitations of 2 U.S.C. § 441a(d). Enclosed with the complaint are a series of news articles and other materials apparently intended to show opportunities for coordination between the NRSC and the Rehberg campaign. Specifically, this asserted evidence of coordination consists of (1) a news article taken from the Associated Press by the Falls Tribune which describes a trip made by Mr. Rehberg in July, 1995 to Washington, D.C. to meet with "prominent Republicans, including Sen. Alfonse D'Amato of New York, chairman of the National Republican Senatorial Committee," and (2) copies of invitations to fundraising events held by Montanans for Rehberg in Washington, D.C. on October 24, 1995 and March 21, 1996 on which appear the names of, inter alia, U.S. Senator Conrad Burns and U.S. Senator Dirk Kempthorne, both of whom "have served on the steering committee of the NRSC." (Complaint, page 3 and Exhibits H and I). Further, the complaint encloses a partial transcript of the telephoned participation on May 1, 1996, by Dennis Rehberg in a radio program originating in Billings, Montana, during which he stated, "I flew back to Washington, D.C. . . . In fact, what I'm doing is I am meeting with the [National Republican] Senatorial Committee." (Complaint, Exhibit J).

## 2. Content of Advertising

The specifics of the NRSC advertising campaign cited in the complaint were as follows:

a. On or about April 16, 1996, the NRSC, according to a press release attached to the complaint, began "a Montana radio campaign urging Senator Max Baucus to heed the wishes of Montanans by voting to support term limits when the measure is considered on the floor of the United States Senate." The heading for the press release read: **"NEW GOP ADS: BAUCUS SHOULD HEED MONTANANS ON TERM LIMITS,"** while the sub-heading read, **"NRSC COMMENCES MONTANA RADIO CAMPAIGN URGING BAUCUS TO VOTE FOR TERM LIMITS WHEN MEASURE COMES BEFORE SENATE."**

The press release also included the script for the sixty-second spot, which was apparently broadcast beginning on or about April 16 and which contained the following language:

Liberal Max Baucus voted to raise his own pay, then voted to raise our taxes. He was wrong. While working families are having a tough time making ends meet here in Montana, Max Baucus is back in Washington giving himself a big payraise, then voting to raise our taxes.

Max Baucus increased his pay by more than \$23,000, then increased our taxes by more than \$2,600 per family. That's an outrage. Pay raises . . . higher taxes. That's not Montana - but it is Max Baucus.

Soon the Senate will vote on term limits - and the people of Montana support it. But not Max Baucus. In fact, he's already opposed term limits. It's just what you would expect from a senator who's been in Washington for twenty-one long, liberal years.

Call liberal Max Baucus. Tell him he was wrong to vote himself a big payraise, then vote to raise our taxes. Tell him it's time to vote for term limits.

b. On or about April 25, 1996, the NRSC "prepared and paid for" another radio advertisement. The press release for this advertisement bore the heading: **"GOP ADS:**

**BAUCUS SHOULD BACK BALANCED BUDGET ON SENATE FLOOR,”** and the sub-heading read: “NRSC COMMENCES MONTANA RADIO CAMPAIGN OUTLINING BAUCUS LIBERAL RECORD OF TAXING AND SPENDING.” The script for this second advertisement read:

You already know that liberal Max Baucus voted to raise his own pay by \$23,000, then voted to raise your taxes by more than \$2,600 a family.

But did you know that in the 21 long liberal years that Baucus has been in Washington, our debt skyrocketed to \$5 trillion.

It's a fact.

And still liberal Max Baucus refuses to consistently vote for a real balanced budget.

Instead, he's voted to spend billions more on wasteful government spending.

That's right. Billions more.

Liberal Max Baucus even voted to spend our taxdollars to pay for an alpine slide in Puerto Rico and a casino in Connecticut.

That's not Montana. But it is Max Baucus.

Call liberal Max Baucus at (800) 332-6106. Tell him to stop wasting our hard earned money. Tell him to vote for Congress' balanced budget plan.

Paid for by the National Republican Senatorial Committee.

c. On or about May 6, 1996, the NRSC “prepared and paid for” additional radio advertising. The script for this advertisement read:

[Dramatic percussion]  
1974:

[automatic weapon sound]  
Godfather part II is the top movie.

[people ooh-ing and aah-ing]  
 Streaking become a national fad.

Max Baucus goes to Washington....

And our national debt is 484 billion dollars...

A lot's changed in 21 years...

For example, Max Baucus's salary has more than tripled.

[percussion] from 42 thousand to 133 thousand a year...

And the national debt has skyrocketed [piano] to five trillion dollars.

What have we gotten from Baucus's 21 long liberal years?

More taxes and more debt.

[percussion] Liberal Baucus voted for five of the largest tax increases in American history.

In one vote alone, he increased taxes on Montana families by \$2600 dollars a year.

Baucus even voted to raise taxes on social security, small businesses and gasoline.

[Piano crescendo] Call liberal Max Baucus. Tell him to balance the budget. Tell him he was wrong to raise our taxes and spend us into debt. Tell him to vote for the majority's plan to balance the budget.

Paid for by the National Republican Senatorial Committee

d. On or about May 10, 1996, the NRSC again "prepared and paid for certain television advertising . . . ." According to the script submitted with the complaint, the advertisement contained the following:

1974 Liberal Max Baucus goes to Washington. Your share of the National Debt: \$2300. (photo of Max 1974, on screen words say: "Your share of the national debt - \$2300)."

22 long liberal years later, government spending explodes.  
Cut away newspaper clip says "Deficit sets record -- again."  
Background red brick like).

(Top of screen says 1974-96. Baucus votes for 5 five of the biggest tax increases in american [sic] history.)

Baucus votes for 5 of the biggest tax increases in history.

(Top of screen 1996. recent photo of Max frowning, words on screen say your share of the National debt - \$19,000. Red brick background.)

your share of the national debt: \$19,000.

What else is up, Baucus' salary. it's tripled to \$133,000.  
(top of screen says Baucus's Salary. Background, purple with capitol image and dollar bill image inset. Red arrow from lower left to upper right side of screen. as arrow moves upwards on screen say Tripled to \$133,000.)

We need a balanced budget.  
(Same frowning photo, same purple background. words say "Call Liberal Max Baucus. (800) 332-6106"  
paid for by National Republican Senatorial Committee in small type at bottom of screen.)

Call liberal Max Baucus and tell him to support the majority's balanced budget plan.

screen text is in bold

e. The complaint further asserts that the NRSC, during the same time period the above advertisements were run, "prepared and paid for radio advertising for the purpose of electing Dennis Rehberg to the U.S. Senate." Two scripts for advertisements are submitted in relation to these Rehberg-related advertisements, which were apparently identical except for the disclaimers at the bottom. Both read:

[Western guitar with gospel humming background throughout]

Dennis Rehberg: "November 5 seems a long way away. That's when we'll elect a new senator for Montana.

I'm Denny Rehberg and I want to be that Senator.

I've lived in Montana all my life. My kids go to school here.

For the last five years I've served as your Lieutenant Governor.

Marc Racicot and Denny Rehberg have done things I'm proud of.

But this election is really about the future.

It's about being firm in convictions. And not being something different around election time.

It's about getting government off our backs. And it's about making government affordable again.

I want you to watch Denny Rehberg campaign and how it's conducted.

No misleading ads. No hitting below the belt.

I want you to understand how different Denny Rehberg and Max Baucus really are.

I want you to know how Montana and America can once again be.

The audio disclaimer related to the first of the two advertisements apparently stated: "Paid for by Montanans for Rehberg." The second stated: "Paid for by National Republican Senatorial Committee."

The complaint asserts that none of the advertisements discussed above were "issue advertising . . . because none of the issues contained in the ads were before the Senate for a vote during the time the ads were aired immediately prior to, or immediately after, the airing of the ads." It also asserts that the NRSC has counted none of the expenditures for these

advertisements against its coordinated expenditure limit for the 1996 Senate race in Montana, pursuant to 2 U.S.C. § 441a(d). According to the complaint, the NRSC expended in excess of \$100,000 for the advertisements cited.

The complaint includes additional information in support of its allegation that the content of the advertisements at issue constituted "electioneering," thus bringing the costs of the advertisements within the NRSC's Section 441a(d) limit. One item is a copy of a Controversial Advertising Campaign Report filed on or about May 15, 1996 allegedly by the NRSC with KRTV in Great Falls, Montana. This Report states that the ads covered in the report were for "[t]he defeat of Senator Max Baucus on his re-election campaign for 1996."

### **3. Use of Impermissible Funds**

As noted above, the complaint estimates that, "as of May 22, 1996, the NRSC . . . spent in excess of \$100,000 in producing and airing the above advertisements." It also alleges that the expenditures for the advertisements involved partial use of non-federal, impermissible funds.

The documentary basis for this second allegation is an entry in the NRSC's 1996 May Monthly Report showing a payment on April 23, 1996 to Multi Media Services Corp. of Alexandria, VA of \$32,637.50 for "media purchase." The report allocates this expenditure between a \$21,214.37 federal share (65%) and a \$11,423.13 non-federal share (35%), and categorizes the expenditure(s) as "administrative/voter drive." Consistent with this categorization, no particular state or Senate race is cited in this report; however, also attached to the complaint are a purchase order and a contract confirmation which together show that Multi-Media contracted with at least one and possibly three stations in Billings, Montana to run radio

advertisements between April 16 and May 3, 1996, the same period of time during which the NRSC's advertisements referencing Senator Baucus apparently were run.

#### **4. Reporting**

The complainant alleges that the expenditures for the advertisements at issue should have been reported as coordinated party expenditures, not as allocable administrative or generic voter drive expenditures.

#### **B. The Law**

2 U.S.C. § 441a(a)(1)(B) and (a)(2)(B) limit to \$20,000 per calendar year the amount which any person may contribute to a political committee established by a national political party, and to \$15,000 per calendar year the amount which a multi-candidate committee may contribute to a national party committee. Generally, 2 U.S.C. § 441a(a)(2)(A) limits to \$5,000 the amount which any multi-candidate committee may contribute per election to a candidate and his or her authorized committee. 2 U.S.C. § 441a(f) prohibits political committees from accepting contributions or making expenditures in violation of the statutory limitations. 2 U.S.C. § 441b prohibits political committees from making or accepting contributions which contain corporate or labor union funds.

11 C.F.R. § 102.5(a)(1) requires that political committees which make expenditures "in connection with both federal and non-federal elections" either establish separate federal and non-federal accounts or set up a single account "which receives only contributions subject to the limitations and prohibitions of the [Federal Election Campaign] Act." If separate federal and non-federal accounts are established, all expenditures made in connection with federal elections must be made from the federal account.



Pursuant to 11 C.F.R. 106.1(e), party committees that make disbursements for certain specific categories of activities undertaken in connection with both federal and non-federal elections must allocate those expenses in accordance with the rules at 11 C.F.R. § 106.5. These categories include administrative expenses, fundraising costs, the costs of certain activities which are exempt from the definitions of "contribution" and "expenditure," and the costs of generic voter drives. 11 C.F.R. § 106.5(a)(2)(i-iv). "Administrative expenses" include "rent, utilities, office supplies, and salaries, except for such expenses directly attributable to a clearly identified candidate." 11 C.F.R. § 106.5(a)(2)(i). "Generic voter drives" include activities which "urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate." 11 C.F.R. § 106.5(a)(2)(iv). (Emphasis added.)

The Senate and House campaign committees of national parties must allocate administrative expenses and the costs of generic voter drives according to the funds expended method established at 11 C.F.R. § 106.5(c)(1). A minimum of 65% of these costs must be allocated each year to the federal account. 11 C.F.R. § 106.5(c)(2).

Pursuant to 2 U.S.C. § 441a(d)(3)(A), the national committee of a political party or a state committee of a political party may make expenditures in connection with the general election campaign of candidates who are affiliated with such party for election to the United States Senate which do not exceed the greater of 2 cents multiplied by the voting age population of the state involved, or \$20,000. As is noted by the Supreme Court in Colorado Republican Federal Campaign Committee v. FEC, 116 S.Ct. 2309, 2315 (1996) ("Colorado Republicans"), this special provision for party committee expenditures (which the Court termed the "Party

Expenditure Provision") is an exception to the rules limiting contributions in federal elections which are set out at 2 U.S.C. § 441a.<sup>1</sup> Party committees which exceed the Section 441a(d) limitations violate 2 U.S.C. § 441a(f). 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) requires that party committees report expenditures made pursuant to 2 U.S.C. § 441a(d).

2 U.S.C. § 431(9)(a) defines "expenditure" as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office . . . ." "Independent expenditures" as defined at 2 U.S.C. § 431(17) include only expenditures which "expressly advocat[e] the election or defeat of a clearly identified candidate." The statute does not by its language impose the same express advocacy requirement upon expenditures which are not "independent," because they have been made in "cooperation or consultation with [a] candidate" . . . or "in concert with, or at the request or suggestion of, [a] candidate," in order for them to be considered subject to the limitations at 2 U.S.C. § 441a(d).

The Commission's regulations at 11 C.F.R. § 109.1(b)(4) set out the parameters within which an expenditure may be presumed to have been coordinated rather than independently made. This presumption arises, *inter alia*, when there is evidence that the expenditure has been "[b]ased on information about the candidate's plans, projects or needs provided to the expending person by the candidate, or the candidate's agents, with a view toward having an expenditure

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<sup>1</sup> Another exception to the general rule is found at 2 U.S.C. § 441a(h) which permits the Republican and Democratic Senatorial Committees, or a national party committee, or any combination thereof, to contribute up to \$17,500 to a candidate for nomination or election to the United States Senate during the election year in which that individual is a candidate. This latter, party contribution exception is in addition to the special party committee expenditure limitation at Section 441a(d).

made . . . ." 11 C.F.R. § 109.1(b)(4)(A). In Advisory Opinion 1984-30 , the Commission concluded that contacts between a multicandidate political committee and a candidate during a primary campaign would raise a rebuttable presumption that general election expenditures by the committee on behalf of the same candidate had been based on information about the candidate's plans, projects or needs.

In June, 1996, in Colorado Republicans, the Supreme Court rejected the Commission's long-standing position that party committees, by virtue of their close relationship to candidates, were incapable of making independent expenditures; rather, the Court held that political parties can make expenditures independent of candidates which are not subject to the limitations of 2 U.S.C. § 441a(d). 116 S.Ct at 2315-2316. The facts before the Court involved advertisements which had been placed by the Colorado Republican Federal Campaign Committee ("the CRFCC") prior to the 1988 primary election for the U.S. Senate in that state. These advertisements were critical of the legislative record of then-U.S. Senator Timothy Wirth, who was running unopposed for renomination by the Democratic Party.<sup>2</sup> The Supreme Court's decision addressed the ultimate question of whether the expenditures for the CRFCC

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<sup>2</sup> The text of this advertisement was as follows:

Here in Colorado we're used to politicians who let you know where they stand and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.

Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

advertisements at issue should have counted against the state party's Section 441a(d) expenditure limitations related to the 1988 general election for the Senate in Colorado.

In its decision in Colorado Republicans, the Supreme Court deemed the advertising campaign undertaken by the party committee to have been independent because there was undisputed, "uncontroverted direct evidence" that the advertising at issue had been "developed . . . independently and not pursuant to any general or particular understanding with a candidate." 116 S.Ct. at 2314. In light of this independence, the expenditures involved were found not to have been subject to Section 441a(d) limitations. The Supreme Court left unanswered the question of whether party expenditures which are coordinated with candidates can be limited constitutionally, and remanded the case to the lower courts to address this particular issue. 116 S.Ct. at 2319.

The Supreme Court in Colorado Republicans also did not address the content of the CRFCC advertisements for which the expenditures at issue were made, i.e., the Court did not make a determination as to whether that content constituted an "electioneering" message. The Court of Appeals, however, in its earlier decision in FEC v. Colorado Republican Federal Campaign Committee, 59 F.3d 1015 (10th Cir. 1995), addressed the issue of the standard to be applied in finding whether particular language constitutes electioneering. After quoting at length from *Advisory Opinion 1984-15*, including the portion in which the Commission found that the advertisements there at issue constituted electioneering because they had as "their clear import and purpose . . . to diminish support for any Democratic Party presidential nominee and to garner support for whoever may be the eventual Republican Party nominee," the lower court found that the Colorado party's 1988 advertisements in opposition to Senator Wirth's record had left "the

reader (or listener) with the impression that the Republican Party sought to 'diminish' public support for Wirth and [to] 'garner support' for the unnamed Republican nominee." *Id.*<sup>3</sup> The Court of Appeals also cited Advisory Opinion 1985-14 and its quotation from United Auto Workers defining "electioneering message" as including "statements designed to urge the public to elect a certain candidate or party."<sup>4</sup> Given the silence of the Supreme Court on the issue of electioneering messages, these portions of the Court of Appeals' decision reflect present law. (Emphasis added).

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<sup>3</sup> In Advisory Opinion 1984-15 the Commission addressed the application of the limitations established at 2 U.S.C. § 441a(d) to expenditures which the Republican Party proposed to make for advertisements criticizing one of the potential Democratic opponents of the eventual Republican candidate for President. These advertisements were to be run both before and after that opponent was nominated for election. The Commission determined that the expenditures for the proposed advertisements would constitute either direct contributions or coordinated party expenditures in connection with the general election. The Commission further found, *inter alia*, that it was not "material" whether a specific nominee had been chosen at the time of the party's expenditures, because consultation or coordination with a candidate as to such expenditures is permissible but not required. And, as it later found in AO 1985-14, the Commission stated that the time frame for coordinated party expenditures was not restricted to the post-nomination campaign period.

<sup>4</sup> In Advisory Opinion 1985-14, the Commission addressed a request concerning proposed media advertising and a sample mailer to be paid for by the Democratic Congressional Campaign Committee ("DSCC"). Each of the planned advertisements, to be run in 1985 for the purpose of influencing the 1986 elections, but assertedly without consultation or cooperation with a candidate, were to contain criticism of the record of a particular member of Congress and of all Republican members as a group. Some would refer to a previous or upcoming election, while others would not refer to an election or use language constituting express advocacy. Some would include the language: "Vote Democratic."

In responding to this request, the Commission reviewed AO 1984-15, stating that there "the Commission [had] concluded that the limitations of Section 441a(d) would apply where the communication both (1) depicted a clearly identified candidate and (2) conveyed an electioneering message." In addition to defining "electioneering message" as noted above, the Commission defined a candidate as "clearly identified" if "his or her name or likeness appears or if his or her identity is apparent by unambiguous reference . . . ."

### **C. Response to Complaint**

On July 10, 1996, counsel for the NRSC filed a response to the complaint. Attached to this response is an affidavit signed by Mike Pieper, campaign manager for Montanans for Rehberg. Also attached is a copy of a letter from Mr. Pieper to a television station regarding the radio advertisements at issue in this matter. (See further discussion below.)

The response filed by the NRSC denies the legal and factual assertions in the complaint. The following is a summary by issue of this response:

#### **1. Coordination with Candidate**

As stated above, the complaint alleges that Dennis Rehberg made three trips to Washington, D.C. in mid and late 1995 and the first half of 1996, during which he attended two fundraisers held by his campaign committee, one in October hosted, inter alia, by two members of the NRSC steering committee and one held in March at NRSC headquarters. He also allegedly met in July, 1995 and May, 1996 and with NRSC representatives. In his response, counsel for the NRSC only addresses these specific fundraising efforts on the part of Mr. Rehberg in a footnote in which he states: "The NRSC has no knowledge or comment about these facts which are not relevant to answering the charge in this complaint regarding our issue advertising." (NRSC Response, page 2, fn. 10).

With regard to possible consultation with the Rehberg campaign regarding the Baucus advertisements aired by the NRSC, the latter committee's response makes only the conclusory statement that the advertisements "were not for the purpose of election or defeating any candidate and were not executed in consultation with the Rehberg Committee." (NRSC Response, page 6). The sole detailed discussion of coordination, or the asserted lack thereof, in

the NRSC's response involves the allegation that the NRSC paid for advertisements supporting Mr. Rehberg prior to the Montana primaries. Counsel asserts that the "NRSC has not and did not plan, prepare, consult on, pay for, or even consider running radio spots for Dennis Rehberg during the time in question." He states: "In fact, there was no coordination between the NRSC and the Rehberg campaign about the Rehberg campaign's decision to broadcast radio spots: all of their advertising occurred before the Montana primary on June 4, 1996, and the NRSC adhered to its long-standing policy of not becoming involved in contested Republican primaries." (NRSC Response, page 5).

Counsel asserts that "[t]he NRSC did not authorize the use of its name in any advertisements in Montana other than the legislative advocacy scripts noted in Part II 1 of this response, nor did the NRSC pay for the airing of any ads which may have mistakenly borne its name." He explains that a member of the production company which produced the Rehberg advertisements "made on his own initiative two versions of the same spot: one with a Rehberg disclaimer and one with an NRSC disclaimer." Certain stations "incorrectly" used the one with the NRSC disclaimer. According to counsel, once this error was discovered, "stations were immediately notified that ads with the incorrect disclaimer should be immediately taken off the air." (NRSC Response, pages 5-6 and Exhibit G.)

Attached to the NRSC'S response are copies of three facsimiles, including one from Bob Hoene of Fifth Avenue Advertising, the advertising company apparently used by the Rehberg campaign, to the candidate, Dennis Rehberg. The cover memorandum, dated June 11, 1996, describes the accompanying copies of earlier facsimiles as "a memo that instructed stations to use only the Montana tag" and "a typical signed order from one of the stations." The

instructional memo dated May 15, 1996, contains the following language: "Also, please remember to play the spot with the Montana Tag!! Do not run the Senatorial tag at this time." The signed radio order form, also dated May 15, 1996, contains the printed instruction, "USE THE DUB YOU CURRENTLY ARE RUNNING" followed by the handwritten notation, "Montana Tag."

As stated above, also attached to the NRSC's response is a letter from the Rehberg campaign manager to a television station dated May 30, 1996, explaining the campaign's position on the disclaimer issue. This letter contains the statement: "The Republican Senate Committee has paid for none of our ads. All of our radio ads have been paid for by this campaign."

As is also noted above, another attachment to the NRSC's response is a sworn affidavit signed by Mike Pieper, manager of the Rehberg campaign, in which Mr. Pieper states that the "NRSC response and attachments correctly recount the purpose behind the Rehberg Committee's decision to produce, air, and pay for pre-primary radio advertising, the genesis of the disclaimer error, and the efforts all parties undertook to immediately correct it." In the affidavit Mr. Pieper states that there was no coordination between itself and the Rehberg campaign with regard to the Rehberg ads or "the NRSC's legislative advocacy advertisements."

## **2. Language of Advertisements**

Counsel argues that the language in the advertisements criticizing Senator Baucus did not contain "any express advocacy or electioneering message regardless of which test, regulation, or Advisory Opinion the Commission may use." Rather, counsel argues that these were "legislative advocacy spots" which "focus(ed) on the verifiable legislative record of an incumbent federal



officeholder" and which "end with an express call for the listener to take the specific, non-electoral action of contacting his or her officeholder and urging him to take action on a specific, pending legislative proposal."

Counsel further argues that the NRSC advertisements at issue were "completely within the Republican National Committee's six factual proffers in Advisory Opinion Request 1995-25," making the costs of the advertisements "administrative expenses" or "generic voter drive costs" allocable pursuant to 11 C.F.R. § 106.5.<sup>5</sup> Counsel continues: "Accordingly, . . . it is

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<sup>5</sup> In 1995 the Commission in Advisory Opinion 1995-25 looked at a media advertising program proposed by the Republican National Committee ("RNC"). This program was to involve "a series of legislative proposals being considered by the U.S. Congress . . ." The request explained that these advertisements were intended to influence positively the public's view of Republican positions, and listed six express assumptions as follows:

- a. There might or might not be a direct reference to a member of Congress who was also a candidate for federal office;
- b. Even if there were such a reference to a candidate, there would be no express advocacy of his or her election or defeat, nor any "electioneering message" or reference to any federal election;
- c. The only "call to action" would be one urging support for, or defeat of, specific legislation;
- d. Each advertisement would include the disclaimer required by the Federal Communications Commission;
- e. The salaries of the RNC employees working on this program would be allocated pursuant to 11 C.F.R. § 106.5; and
- f. The RNC would report the expenditures involved to the Commission.

The Commission determined in its Advisory Opinion that media advertising programs which "focus on national legislative activity and promote the Republican Party" should be treated as having been "made in connection with both Federal and non-federal elections, unless the ads would qualify as coordinated expenditures on behalf of any general election candidates of the

a perfectly legal and Commission-approved practice for the NRSC to use our defined ratio of federal and non-federal funds to pay for the costs incurred in preparing these ads."

### 3. Timing of Advertisements

In support of the argument that the subjects of the advertisements were "live, pending issues before the United States Senate" at the time the advertisements were broadcast, counsel has included with the NRSC response "the Senate Majority Leader's legislative calendar for the same time period that the NRSC's ads were being aired." A comparison of the dates of the advertisements and the scheduled dates of Senate floor debates on particular issues produces the following:

<u>Advertisement</u>		<u>Floor Debate</u>	
<u>Date</u>	<u>Subject</u>	<u>Date</u>	<u>Subject</u>
April 16, 1996	Term Limits	April 22-24, 1996	Term Limits
April 25, 1996	Balanced Budget	April, 1996 (no specific date)	Balanced Budget
May 6, 1996	Balanced Budget	May 23-24, 1996	Budget Resolution
May 10, 1996	Balanced Budget	May 23-24, 1996	Budget Resolution

### 4. Controversial Advertising Campaign Report

Counsel asserts that a "Controversial Advertising Campaign Report," allegedly submitted to a television station in Great Falls, Montana and cited by the complainant as evidence of advocacy of Senator Baucus' defeat, was not in fact submitted by the NRSC. Rather, counsel

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Party under 2 U.S.C. § 441a(d)." The criteria for qualification as coordinated expenditures were not discussed in the opinion. Expenditures for uncoordinated advertisements would be allocable, pursuant to 11 C.F.R. § 106.5, as either administrative costs or, depending upon the content, as generic voter drive costs. The Commission cited the Supreme Court's statement in Buckley v. Valeo, 424 U.S. 1 (1976), that, because the major purpose of political committees is the nomination or election of candidates, their expenditures "are, by definition, campaign-related."

claims that the Report was completed by the station's president "on his own initiative without consultation with the NRSC or any of its agents." (NRSC Response, pages 4-5).

Attached to the NRSC's response as Exhibit E are copies of a Controversial Advertising Campaign Report kept by KRTV, Great Falls, which is dated 5/15/96 and marked "CANCEL/REVISE," and of a second such report dated 5/24/96. The first reads: "The television ads for: The defeat of Senator Max Baucus on his re-election campaign for 1996," while the second reads: "The television ads for: The passage of the G.O.P. Balanced Budget Proposal. Asks viewers to call Senator Baucus and support the measure."

Exhibit F to the NRSC response is a sworn affidavit submitted by Dwight Sterling, President of Multi Media Services Corporation, the NRSC's media buyer in Montana in 1996. In his affidavit, Mr. Sterling asserts that "[t]he NRSC's response is completely accurate regarding the facts and circumstances of this matter. . . . The response correctly notes that the error was caused within the KRTV television station management, and that no one at the NRSC, or its agents, had consulted on or even seen the incorrect description of the ad before the report was placed in the public file."

#### **D. ANALYSIS**

##### **1. Framework**

Any analysis of whether political party expenditures for a communication come within the limitations imposed by 2 U.S.C. § 441a(d) involves a two-pronged test. First, is there evidence, either general or particular, that the expenditures at issue were made in coordination with a candidate or a candidate committee? Secondly, did the content of the communication

constitute "electioneering?" If the answer to either question is "no," a prong is missing and the expenditures made for the communication would not be limited by Section 441a(d).

In Colorado Republicans, the analysis by the Supreme Court advanced no farther than the issue of coordination, with the Court finding that, in the absence of actual evidence of coordination, the expenditures at issue had to be deemed to have been uncoordinated and thus not subject to limitation, regardless of content. In the present matter, as discussed below, the message of the NRSC's advertisement was an electioneering one. However, in light of the Supreme Court's approach in Colorado Republicans, the issue of coordination is first addressed below.

## **2. Coordination**

### **a. Baucus Advertisements**

The "coordinated party expenditure" limit for 1996 Senate nominees in Montana was \$61,820. As stated above, the complaint alleges that the NRSC, in coordination with the campaign of Dennis Rehberg, made expenditures in excess of \$100,000 in April-May, 1996, for a series of radio and television advertisements run in Montana which were in opposition to the candidacy for re-election of U.S. Senator Max Baucus. The complaint cites four trips to Washington, D.C. by Mr. Rehberg in July and October, 1995 and March and May, 1996, during which he allegedly met with NRSC representatives and/or attended fundraisers organized by his campaign which were either attended by persons connected with the NRSC or held at NRSC headquarters. The complaint also cites statements allegedly made by Mr. Rehberg in a public forum that he was, or would be, meeting with NRSC officials during the Washington visit in May.

As stated above, the response submitted on behalf of the NRSC and its treasurer makes only a passing reference in a footnote to the complaint's factual assertions regarding Mr. Rehberg's trips to Washington, D.C. and his alleged statement during a radio broadcast about meeting with NRSC representatives. The footnote reference is followed by the statement that "the NRSC has no knowledge or comment about these facts . . . ," and terms them "not relevant to answering the charge in this complaint . . . ."

Both respondents deny any coordination between the two committees as to the NRSC's Baucus advertisements, but in differing degrees. The NRSC's denial states that the ads aired by that committee "were not executed in consultation with the Rehberg Committee." (NRSC Response, page 6). This use of the word "execution" can, however, be read as limiting this denial only to aspects of the production, placement and possibly the content of the advertisements, leaving room for consultation on the need for such ads. This Office also finds the NRSC's footnote statement about the Washington trips ambiguous because it is unclear whether the words "knowledge" and "comment" are intended to apply to each of the trips and to the radio appearance cited in the complaint. In summary, the NRSC's response leaves a number of questions unanswered.

The Rehberg denial in the sworn statement submitted by Mike Pieper through the NRSC is more direct and all-encompassing, but also brief and conclusory. This denial simply states that "the NRSC's legislative advocacy advertisements were not coordinated with the Rehberg campaign. . . ." Mr. Pieper's conclusory statement does not address Mr. Rehberg's trips to Washington, D.C. nor the meetings he allegedly held with NRSC officials.

In light of the information in the complaint about Mr. Rehberg's visits with NRSC officials prior to, or simultaneously with, the broadcasts of the NRSC's Baucus advertisements in Montana, and the respondents' silence on the nature and content of Mr. Rehberg's contacts with the NRSC, there is evidentiary support for a preliminary finding of coordination between the Rehberg committee and the NRSC, pursuant to 11 C.F.R. § 109.1(b)(4), despite the conclusory denials contained in the responses to the complaint. At the least, there were opportunities for Mr. Rehberg, as a candidate, to discuss generally the needs of his general election campaign, assuming his nomination on June 6, 1996, and the related desirability of a campaign against Senator Baucus prior to the general election campaign.

#### **b. Rehberg Advertisement**

As stated above, the only detailed denial of coordination made by the NRSC involves the pro-Rehberg radio advertisement cited in the complaint. The NRSC and the Rehberg Committee, the latter via the Pieper affidavit attached to the NRSC's response, argue that this advertisement was controlled and paid for by the Rehberg campaign, not by the NRSC. As noted above, the NRSC asserts that confusion arose as to which committee had paid for these ads because certain stations in Montana mistakenly used the wrong version of the radio spot. The NRSC states that versions of the advertisement bearing two different disclaimers had been prepared by the production company, the identity of which is unclear, pursuant to the "initiative" of a member of that company, with some stations using the version with the NRSC disclaimer even though the Rehberg committee had paid for the spot. Several memoranda and radio orders are attached to the NRSC response in support of this claim of station error. Nevertheless, despite the respondents' denials of NRSC involvement in the preparation and placement of the Rehberg

advertisement, questions remain, particularly with regard to how the production company was sufficiently informed to prepare two versions of the advertisement, one with an NRSC disclaimer and one with a Rehberg campaign disclaimer.

### **3. Content of Baucus Advertisements**

As stated above, the Supreme Court in United Auto Workers defined "electioneering message" as "statements 'designed to urge the public to elect a certain candidate or party'." 352 U.S. at 587. As is also noted above, the Court of Appeals in Colorado Republicans, without later criticism by the Supreme Court, utilized the Commission's definition of "electioneering" in Advisory Opinion 1984-15, and thus relied, not upon particular language, but rather upon the overall impact of the message as one intended to "garner support" for one candidate and to "diminish support" for another.

There is no question that the NRSC's advertisements at issue "depict[ed]" a "clearly identified candidate," Senator Max Baucus. They also were clearly designed to reduce support for Senator Baucus's continuation in office. All four advertisements were critical of him as an incumbent U.S. Senator; they cited his office, referred to him as "liberal Max Baucus;" and included negative statements about events which had occurred during his tenure such as salary and tax increases. Thus, despite the facts that the headlines of the press releases announcing the NRSC Baucus advertisements stressed legislative actions and that the advertisements themselves ended with calls for action involving particular legislative issues, and even though the NRSC has provided evidence that the timing of the advertisements coincided with Senate floor debates in April and May, 1996, on those issues, it is clear that the overriding focus in the advertisements was upon Senator Baucus the candidate, not upon Senator Baucus' potential votes on particular

Senate bills. The advertisements contained primarily electioneering messages. It appears that the parts of the ads which look like issue advocacy, as well as the issue-related calls to action, may have been included only in an attempt to take the ads outside the reach of Section 441a(d).

Based upon the opportunities for coordination presented by Mr. Rehberg's visits with NRSC officials and the content of the advertisements at issue, there is reason to believe that the NRSC and Stan Huckaby, as treasurer, violated 2 U.S.C. § 441a(f) by making excessive coordinated party expenditures on behalf of the candidacy of Dennis Rehberg in 1996; 2 U.S.C. § 434(b) by failing to so report the expenditures involved; and 2 U.S.C. §§ 441a(f) and 441b and 11 C.F.R. § 102.5(a) by using non-federal accounts containing impermissible funds to make a portion of these expenditures.